

**16-6a-612 Derivative suits.**

- (1) Without affecting the right of a member or director to bring a proceeding against a nonprofit corporation or its directors or officers, a proceeding may be brought in the right of a nonprofit corporation to procure a judgment in its favor by a complainant who is:
  - (a) a voting member; or
  - (b) a director in a nonprofit corporation that does not have voting members.
- (2) A complainant may not commence or maintain a derivative proceeding unless the complainant:
  - (a) is a voting member, or a director in a nonprofit corporation that does not have voting members, at the time the proceeding is brought; and
  - (b) fairly and adequately represents the nonprofit corporation's interests in enforcing the nonprofit corporation's right.
- (3)
  - (a) A complainant may not commence a derivative proceeding until:
    - (i) a written demand is made upon the nonprofit corporation to take suitable action; and
    - (ii) 90 days have expired from the date the demand described in Subsection (3)(a)(i) is made, unless:
      - (A) the complainant is notified before the 90-day period expires that the demand is rejected by the nonprofit corporation; or
      - (B) irreparable injury to the nonprofit corporation would result by waiting for the 90-day period's expiration.
  - (b) A complaint in a derivative proceeding shall be:
    - (i) verified; and
    - (ii) allege with particularity the demand made to obtain action by the board of directors.
  - (c) A derivative proceeding shall comply with the procedures of Utah Rules of Civil Procedure, Rule 23.1.
  - (d) The court shall stay any derivative proceeding until the inquiry is completed and for an additional period as the court considers appropriate if:
    - (i) the nonprofit corporation commences an inquiry into the allegations made in the demand or complaint; and
    - (ii) a person or group described in Subsection (4) is conducting an active review of the allegations in good faith.
  - (e) If a nonprofit corporation proposes to dismiss a derivative proceeding pursuant to Subsection (4)(a), discovery by a complainant in the derivative proceeding:
    - (i) is limited to facts relating to:
      - (A) whether the person or group conducting the inquiry is independent and disinterested;
      - (B) the good faith of the inquiry; and
      - (C) the reasonableness of the procedures followed by the person or group conducting the inquiry; and
    - (ii) may not extend to any facts or substantive issues with respect to the act, omission, or other matter that is the subject matter of the derivative proceeding.
- (4)
  - (a) A derivative proceeding shall be dismissed by the court on motion by the corporation if a person or group specified in Subsection (4)(b) or (4)(f) determines in good faith, after conducting a reasonable inquiry upon which the person's or group's conclusions are based, that the maintenance of the derivative proceeding is not in the best interest of the nonprofit corporation.
  - (b) Unless a panel is appointed pursuant to Subsection (4)(f), the determination in Subsection (4)(a) shall be made by:

- (i) a majority vote of independent directors present at a meeting of the board of directors, if the independent directors constitute a quorum; or
  - (ii) a majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not the independent directors appointing the committee constituted a quorum.
- (c) None of the following by itself causes a director to be considered not independent for purposes of this section:
  - (i) the nomination or election of the director by persons:
    - (A) who are defendants in the derivative proceeding; or
    - (B) against whom action is demanded;
  - (ii) the naming of the director as:
    - (A) a defendant in the derivative proceeding; or
    - (B) a person against whom action is demanded; or
  - (iii) the approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.
- (d) If a derivative proceeding is commenced after a determination is made rejecting a demand by a complainant, the complaint shall allege with particularity facts establishing either:
  - (i) that a majority of the board of directors did not consist of independent directors at the time the determination was made; or
  - (ii) that the requirements of Subsection (4)(a) are not met.
- (e)
  - (i) If a majority of the board of directors does not consist of independent directors at the time the determination is made to reject a demand by a shareholder, the corporation has the burden of proving that the requirements of Subsection (4)(a) are met.
  - (ii) If a majority of the board of directors consists of independent directors at the time the determination is made to reject a demand by a complainant, the plaintiff has the burden of proving that the requirements of Subsection (4)(a) are not met.
- (f)
  - (i) The court may appoint a panel of one or more independent persons upon motion by the corporation to make a determination whether the maintenance of the derivative proceeding is in the best interest of the corporation.
  - (ii) If the court appoints a panel under Subsection (4)(f)(i), the plaintiff has the burden of proving that the requirements of Subsection (4)(a) are not met.
- (g) A person may appeal an interlocutory order of a court that grants or denies a motion to dismiss brought pursuant to Subsection (4)(a).
- (5) On termination of a derivative proceeding the court may order:
  - (a) the nonprofit corporation to pay the plaintiff's reasonable expenses, including attorney fees, incurred in the proceeding, if it finds that the proceeding results in a substantial benefit to the nonprofit corporation;
  - (b) the plaintiff to pay a defendant's reasonable expenses, including attorney fees, incurred in defending the proceeding, if it finds that the proceeding was commenced or maintained:
    - (i) without reasonable cause; or
    - (ii) for an improper purpose; or
  - (c) a party to pay an opposing party's reasonable expenses, including attorney fees, incurred because of the filing of a pleading, motion, or other paper, if the court finds that the pleading, motion, or other paper was:
    - (i)
      - (A) not well grounded in fact, after reasonable inquiry; or

- (B) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and
- (ii) interposed for an improper purpose, such as to:
  - (A) harass;
  - (B) cause unnecessary delay; or
  - (C) cause needless increase in the cost of litigation.

Amended by Chapter 228, 2006 General Session